United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1371

Original with Affidavit of Mailing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.

UNITED STATES OF AMERICA,

Appellant.

- against -

ISRAEL RODRIGUEZ,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER
United States Attorney
Eastern District of New York

EDWARD R. KORMAN,
Chief Assistant United States Attorney
JONATHAN M. MARKS,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No:

- -

UNITED STATES OF AMERICA,

Appellant,

-against-

ISRAEL RODRIGUEZ,

Appellee.

- -

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

The United States appeals from an order of the United States District Court for the Eastern District of New York (Bartels, J.), entered on September 18, 1975, dismissing the superseding indictment herein as against the defendant. Judge Bartels held that dismissal was required by United States v. Bowman, 493 F. 2d 594 (2d Cir. 1974) because an otherwise timely statement of readiness was made prior to the arraignment of defendant. The United States seeks review of the order of the district court because, as discussed below, dismissal was not warranted. For here, although the defendant was arraigned three days and six months after his arrest, a trial date had already been set prior to the arraignment after the district court had

been advised orally that the United States was ready for trial. Under these circumstances, the rationale of United States v. Bowman, holding that a notice of readiness is inoperative unless filed prior to arraignment, is inapposite.

STATEMENT OF FACTS

On December 3, 1974, the defendant Jose Rodriguez was arrested along with Luis Laboy and Jose Laboy and charged with possessing with intent to distribute three ounces of cocaine following an attempted sale to an undercover agent. All three defendants were arraigned on the following day (A. 1-2). On the basis of the evidence then available, it was decided to indict only Luis and Jose Laboy and not Rodriguez. Thus, on February 14, 1975, an indictment was filed against the Laboys (A. 3-4). On March 10, 1975, they appeared before the district court and interposed pleas of not guilty. The case was then set down for trial on May 19, 1975.

On Saturday, May 17, 1975, during a pre-trial interview, additional evidence came to light concerning Rodriguez' role in the narcotics transaction for which the Laboys had been indicted.[1/] As a result of that newly discovered evidence, Judge Bartels' chambers was notified that the United States

---

1/ The newly discovered evidence came to light in the course of an interview between the Assistant United States Attorney in charge of the case and a Drug Enforcement Administration informant in connection with the informant's testimony at trial. Since the case agent was the only witness to testify in the grand jury, there appeared to be no reason to interview the informant except for the purpose of preparing him for trial. Thus, he was first interviewed by an Assistant United States Attorney on May 17, 1975.

would request an adjournment of the trial scheduled for the following Monday in order to seek a superseding indictment naming Israel Rodriguez as well as Luis Laboy and Jose Laboy.

On May 19, the United States formally requested an adjournment for the foregoing reason. At that time, Judge Bartels and the attorneys for Rodriguez and the Laboys were advised that the prosecution was ready for trial against the Laboys, but that in the interest of judicial economy the United States would request an adjournment to file a superseding indictment adding Rodriguez as a defendant later that day. Additionally, the prosecution notified Judge Bartels and counsel for each of the three defendants that it would be ready for trial as soon as Rodriguez could prepare his defense (A. 7-8, 13-18). Both Rodriguez and his attorney were present in court when these representations were made (A. 16).

Judge Bartels expressed his inclination to grant the request for an adjournment and instructed the attorneys for Luis Laboy, Jose Laboy and the appellee Israel Rodriguez to confer on a mutually agreeable trial date. All counsel agreed on July 29, 1975, the earliest date convenient for the district court, and the case against all three defendants was then set down for trial on that date (A. 13-18)[2/] In addition, the court ordered that Rodriguez be afforded the same discovery that had been afforded Jose Laboy (A. 15-16). Thereafter, Judge Bartels held a suppression hearing on the Laboys' motion at which Rodriguez

---

2/ Subsequently, the trial was adjourned until September 18, 1975. This adjournment was not requested by the United States.

and his attorney were present at the request of district court (A. 22).

Later that day (May 19, 1975), a superseding indictment, identical to the original indictment in every respect except that Rodriguez was added as a defendant, was returned by the grand jury (A. 31-32).

Pleading notices were mailed to the defendants and their attorneys on May 28, notifying them that the court had scheduled an arraignment on the superseding indictment for June 5, 1975 (A. 32a). The court adjourned the arraignment on June 6; on that date Luis Laboy, Jose Laboy and Israel Rodriguez interposed pleas of not guilty. That arraignment occurred six months and three days following the defendants' arrest and eighteen days after the United States had represented that it was ready for trial and the court had set a trial date (July 29, 1975) and ordered discovery with respect to all three defendants (A. 7-30).

On July 9, 1975, Rodriguez moved pursuant to F.R. Crim. P. 50(b) to dismiss the indictment as against him on the ground that he was not arraigned until six months and three days after his arrest, notwithstanding the fact that a trial date had been set by the court more than two weeks before the pleading date (A. 33).

On September 8, 1975, the district court entered an order granting Rodriguez' motion to dismiss, relying on United States v. Bowman, 493 F.2d 594 (2d Cir. 1974) (A. 41-47). The

United States then moved for reconsideration, and after additional argument the court, on September 18, 1975, entered a second Memorandum and an Order adhering to its previous decision (A.48-54).[3/]

3/ Luis Laboy pleaded guilty to the indictment on September 18, 1975. On September 23, 1975, after a four day jury trial, Jose Laboy was found guilty of conspiring to distribute cocaine in violation of 21 U.S.C., §846.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE INDICTMENT

A. Introduction

The Speedy Trial Rules, as Chief Judge Kaufman has observed, "were not intended to straightjacket the administration of criminal justice in the federal courts, nor were they designed to place obstacles in the path of legitimate law enforcement efforts and thus thwart the compelling interest in criminal prosecutions." It was never intended that"technicalities would carry the day." United States v. Pierro, 478 F. 2d 386, 389 (2d Cir. 1973). This statement of policy prefaced a holding that a dismissal with prejudice was not appropriate where the United States had failed to advise defense counsel of its readiness for trial (although the district court had been so informed).

There it was held that a notice of readiness was required because "[i]f the judge is to exercise effective control of his cases, he must be informed of the Government's readiness to proceed" (478 F. 2d 388). A dismissal, however,

was not held to be necessary in that case because "[s]ome flexibility may be required in individual cases, particularly when the Government demonstrates that its normal practice comports with the letter and spirit of the Rules, that it proceeded in good faith in the case under consideration and that the defendant has suffered no prejudice as a result of his failure to be informed of the Government's readiness for trial" (478 F. 2d 389).

Our basic position here is that the district court, contrary to the approach mandated in United States v. Pierro, supra, allowed "technicalities to carry the day." The principle purpose of the requirement that a notice of readiness must be filed after arraignment is that "until issue ha[s] been joined, whereupon the case could be assigned to a judge for all purposes, including the disposition of pretrial notices and the conduct of the trial itself" the filing of a notice of readiness is a meaningless gesture. United States v. Bowman, 493 F. 2d 594, 597 (2d Cir. 1974). Obviously, if the purpose of the notice "is to enable the judge to exercise effective control over his cases", it serves no purpose if it is filed at a time when the case has not been assigned to a judge for all purposes. Accordingly, the critical period in determining when the notice of readiness

should be filed is the point at which the case is in a posture that enables the judge to "exercise effective control" over it.

We submit that United States v. Bowman, supra, while correctly decided on its facts, is predicated on an assumption with respect to the assignment of cases to a judge for all purposes, which is not consistent with the actual practice in the Eastern District of New York. In our district, a case is assigned to a district court judge immediately following the presentment of the indictment. In most cases in the Eastern District of New York the case will be in a posture that enables the judge to "exercise effective control" over it, after the indictment is returned by the grand jury. The filing of the notice of readiness at that point advises the district court judge to whom the case was assigned that, as soon as all of the post-indictment procedures, including arraignment, are completed, the United States is ready for trial. Under this regime, the arraignment is no more significant - in terms of the purpose of the notice of readiness - than the pretrial motion stage of the case.

The instant case, of course, presents a somewhat unusual set of circumstances; for here the case was in a posture for the judge to "exercise effective control" over it at the time the statement of readiness was made even though

an indictment had not been returned. Because the defendant's two accomplices had already been indicted, it was known by all that the indictment of the defendant would be assigned to the same district court judge as the pending indictment against his accomplices. Accordingly, having been apprised on May 19, 1975, within the six month period following the arrest of the defendant, that an indictment would be returned that day, the district court judge did exactly what the Speedy Trial Rules contemplated. He "exercis[ed] effective control over the case", by setting the case for trial at the earliest available date on his calendar. In addition, he ordered that the defendant be afforded the same discovery as his accomplices and that the defendant and his attorney be present at the suppression hearing.

Under these circumstances, the statement of readiness, made almost contemporaneously with indictment, albeit a matter of hours earlier, fulfilled its purpose. The dismissal of the indictment, despite this fact and despite the fact that the Speedy Trial Rules do not expressly call for a statement of readiness, would indeed permit "technicalities to carry the day" where the United States has acted in a manner which "comports with the letter and spirit of the Rules."

We now proceed to show that there is no impediment to the result we urge here either by the Speedy

Trial Rules or by any consideration of policy.

B. The Speedy Trial Rules Do Not Require the Dismissal of the Indictment

The Speedy Trial Rules, of course, contain no express requirement that a statement or notice of readiness must be filed; they require only that the United States be ready for trial within six months from the date of the commencement of a criminal proceeding. The holdings in Pierro and Bowman construing the Speedy Trial Rules to require a notice of readiness reflect a judgment of policy, based upon the facts available regarding procedures in the district court, that the Speedy Trial Rules would otherwise be meaningless. Obviously,where in a given case, the facts show that failure to file a notice of readiness during the time prescribed does not in fact have the feared adverse consequences, this Court is free to create an exception to its construction of the Speedy Trial Rules. As Mr. Justice Brandeis observed in a related context: "[T]he decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of stare decisis, is accorded to the decision of a proposition purely of law. For not only may the decision of

the fact have been rendered upon an inadequate presentation of the existing conditions, but the conditions may have changed meanwhile * * * "Burnel v. Coronado Oil and Gas Co., 285 U.S. 392, 412-413 (1932), dissenting opinion.

The holding in United States v. Bowman, that the notice of readiness is ineffective if filed prior to arraignment, was based upon certain facts regarding the procedures in the district court which are entirely different from those present here; the construction placed on the Speedy Trial Rules there should not govern this case.

We submit, indeed, that even if the holding in Bowman were held to be applicable here, the Speedy Trial Rules themselves contain sufficient flexibility to justify the result we seek here. Rule 4 specifically provides that a dismissal of an indictment is not required where the failure to file the notice of readiness within the prescribed period is the result of "excusable neglect". We submit that the "neglect" is always excusable where the purpose of the requirement that a notice of readiness be filed has already been vindicated and where the filing of such a notice would serve no purpose whatever.

Here, on May 19, 1975, the same day on which the

indictment was returned, the district court set the case down for trial on the earliest available date on his calendar. The filing of a notice of readiness after May 19, 1975, would have served absolutely no purpose. Surely the failure to file such a notice in these circumstances was excusable because there was no prosecutorial delay beyond the permissible period in notifying the district court of our readiness for trial, no such delay in the setting of a trial date, no such delay in effecting discovery; in short, no delay which thwarted the public interest in the prompt trial of this case. The only conceivable impermissible "delay" on the part of the Government was its failure to insure that the defendant's plea of not guilty be interposed within six months of his arrest, a failure of absolutely no practical consequence.

In sum, in these circumstances, the pleading on which the district court has focused was a formality devoid of substance, and our failure to request that the arraignment be scheduled two days prior to the pleading date set by the district court does not constitute non-compliance with

the Plan.[4/]

C. Considerations of Policy Militate Against the Dismissal of the Indictment

There are no significant considerations of policy of which militate against the result that we urge here; indeed, these are important considerations of policy supporting the reversal of the order dismissing the indictment. The district court judge was critical of the delay until May, 1975 interviewing the informant who ultimately provided the additional evidence crucial to a successful prosecution. But assuming this criticism is justified, the fact is that the delay occasioned by the failure to interview the witness at an earlier time was well within the six month period permitted by the rule. The real issue is whether the public interest would be served if a defendant charged with dispensing cocaine is

4/ The district court focused on the time of the arraignment because unless that occurs within six months of arrest, the trial cannot be held within six months (A. 50). Concededly that is true, but the focus of the Speedy Trial Rules is on the Government's readiness for trial within six months as opposed to trial within six months. See United States v. Tirinkian, 488 F. 2d 873 (2d Cir. 1973). So for example, if a defendant is arraigned on the last day of the six month period and a notice of readiness is filed, the Speedy Trial Rules have been satisfied even though a trial within six months is impossible.

set free because of technicality which in no way undermined the purpose reflected by the Speedy Trial Rules. We believe that it would not; for as the Supreme Court has reminded us, a dismissal with prejudice is an " 'unsatisfactorily severe remedy' " because in practice "it means that a defendant who may be guilty of a serious crime will go free without having been tried' ". Strunk v. United States, 412 U.S. 434, 439-440 (1973) quoting Barker v. Wingo, 707 U.S. 514, 422 (1972). Surely such a remedy should be invoked only where necessary to vindicate either the Sixth Amendment or the purpose of the Speedy Trial Rules.

CONCLUSION

The judgment of the district court should be reversed.

October 20, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

EDWARD R. KORMAN
Chief Assistant
United States Attorney

JONATHAN MARKS
Assistant United States Attorney
Of Counsel

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

EDWARD R. KORMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of October 1975 he served a copy of the within

Brief and Appendix for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Edward R Korman

EDWARD R. KORMAN

Sworn to before me this
20th day of October 1975

Irene B. Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977